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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 399

JACK H. BREARD,
Appellant,

v.

CITY OF ALEXANDRIA,
Appellee.

Appeal from the Supreme Court of the State of Louisiana

BRIEF FOR AMICI CURIAE

(The Book House for Children, P. F. Collier & Son Corp., F. E. Compton and Company, Encyclopaedia Britannica, Inc. Field Enterprises., The Grolier Society, Inc., and United Educators. Inc.)

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LIST OF AUTHORITIES CITED.

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The decisions below, jurisdiction of this Court, questions presented, the municipal ordinance involved, and the statement of the case are set forth in Appellant's Brief.

INTEREST OF AMICI CURIAE

Amici curiae are publishers and sellers of anthologies, atlases, Bibles, dictionaries, encyclopedias and sets of standard authors.[1] They do 75% to 80% of the subscription

[1] Among the publications offered by Amici are: The American Educator Encyclopedia; Book Trails; The Book of Knowledge; The Book of Popular Science; Britannica Junior; Childcraft; Collier's Encyclopedia; Compton's Pictured Encyclopedia; The Encyclopedia Americana; Encyclopaedia Britannica; Golier Encyclopedia; Harvard Classics; New Junior Classics; Lands and Peoples; My Book House; My Travelship; National Encyclopedia; A Picturesque Tale of Progress; Richards Topical Encyclopedia; The World Book Encyclopedia; The Wonderland of Knowledge.

book business in the United States; the total business amounted to $75,000,000 in 1950. Upwards of 95% of the product is sold to individuals, and almost all of such sales are made direct to the homes through solicitors. A negligible amount is sold through retail outlets, mail orders and other forms of merchandising. The subscription book business is of long standing; it is thoroughly respectable.[2] And while it is dependent upon profits to survive, it has made a valuable contribution to learning. The interests of Amici are therefore even more drastically affected than those of Appellant. Where a Green River ordinance is enforced very few subscription books are sold to individuals. The requirement of obtaining an invitation by letter or phone to visit the home effectively bars such sales. If the judgment of the court below is sustained and Green River ordinances continue to find increasingly wide acceptance, the business of Amici may be destroyed and education will receive a serious blow.

SUMMARY OF ARGUMENT

I

Interstate Commerce

The "Green River" ordinance adopted in the city of Alexandria is a trade barrier erected in the interests of local merchants. Adoption of these ordinances has been widely promoted by retail trade associations, ostensibly to protect housewives but in reality to escape competition. Experience proves that face-to-face solicitation is the most economical and efficient means for distributing Amici's publications. In practice the ordinance amounts to a flat prohibition of Amici's interstate trade in books. Because

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2 "Washington canvassed for subscriptions for a work called *The American Savage; How He May Be Tamed by the Weapons of Civilization.* He must have been a good salesman, for he sold 200 copies in and around Alexandria, Va." Compton, *Subscription Books* 30 (R.R. Bowker Memorial Lectures, N. Y. Public Library, 1939).

the Green River type of ordinance results in suppression of a lawful business for inadequate cause, a majority of state courts have held it invalid as an improper exercise of the state police power. In denying the seller access to the buyer the ordinance chokes off interstate trade at the source. The community has not attempted to explore available alternatives that would safeguard legitimate local interests without destroying Amici's business. Nor has it drawn its ordinance as narrowly as its drastic effect requires. The ordinance is therefore an unconstitutional burden upon interstate commerce.

II

Free Press

The ordinance blocks the dissemination of ideas. Liberty of circulation is indispensable to freedom of the press, and that liberty is guaranteed to commercial as well as non-commercial publications. Nothing in the recent cases is intended to impair the protection traditionally afforded the circulation of secular information and opinion. Since freedom of speech extends to all ideas, it includes the encyclopedias and basic reference works published by Amici. Because the ordinance impedes free circulation of these works it contravenes the Fourteenth Amendment guarantee of a free press.

ARGUMENT

I

The Ordinance Is An Unconstitutional Burden Upon Interstate Commerce

1) *The Green River Ordinance is a Trade Barrier Erected in the Interests of Local Merchants.*

Ostensibly, the Alexandria ordinance, like the Green River prototype, is addressed to the welfare of householders. Actually, it is merely another attempt by local mer-

chants to bludgeon interstate competition. It was avowedly enacted

> "because some householders complained to those in authority that in some instances, for one reason or another, solicitors were undesirable or discourteous, and some householders complained that, whether a solicitor was courteous or not, they did not desire any uninvited intrusion into the privacy of their home." R. 6.

This was window dressing. Section 3 of the ordinance provides that the ordinance

> "shall not apply to the sale, or *soliciting of orders* for the sale, of milk, dairy products, vegetables, poultry, eggs and other farm and garden produce * * *." R. 12. (Emphasis supplied throughout.)[3]

Solicitation by a milk or vegetable vendor is no less an intrusion than that of a book-seller and the latter is no more likely to be uncouth than a butter and egg man. Such

> "inconsistent treatment is * * * proof of the discriminatory character of the ordinance." *White* v. *Town of Culpeper*, 172 Va. 630, 1 S.E. (2d) 269, 273 (1939).

That the typical Green River ordinance was not a spontaneous response to complaints of housewives was demonstrated in the TNEC Hearings. They disclose a pattern of organized promotion of selfish interests.[4] Trade journals urged enactment of the Green River ordinance as a remedy for

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[3] Even where such ordinances do not expressly exempt local merchants, they are in fact exempted by administrative practice. See *Hearings before the Temporary National Economic Committee* (76th Cong. 2d Sess.); Part 29 (Testimony of J. M. George) at 15973 (1940) (hereinafter *TNEC Hearings*); Melder, *The Economics of Trade Barriers*, 16 Ind. L. J. 127, 137-138 (1940).

[4] *TNEC Hearings* 15970-15972. See also *Final Report of the Executive Secretary to the TNEC* (77th Cong., 1st Sess.) 148 (1941); McAllister, *Court, Congress and Trade Barriers*, 16 Ind. L. J. 144, 162 (1940); Jensen, *Burdening Interstate Direct Selling under Claims of State Police Power*, 12 Rocky Mt. L. R. 257, 260-261, 263, 269-270 (1940).

"'the nuisance to local merchants of outside merchants coming in and selling merchandise to householders in competition with them.'"[5]

The retail associations outlined a procedure for bringing about the enactment of the ordinance, stressing that osten-

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[5] *Farm Town Hardware* (Kansas City, Mo., June 1, 1938), *Records of the Temporary National Economic Committee*, Exhibit 2394 (No. 8, p. 10). (This exhibit is not printed in the published Hearings but is on file in the National Archives. See Testimony of J. M. George, *TNEC Hearings* 15985). In Kalispell, Montana, the *Flathead Monitor* (August 5, 1937) described a drive for enactment of a Green River ordinance in these terms:

"Merchants Ask Protective Law. Urge City Council to Ban Peddlers As Nuisance. Kalispell businessmen are aiming a knockout punch at peddlers." Exhibit 2394 (No. 8, p. 4).

In Raton, New Mexico, it was reported (*Daily Range*, June 9, 1937):

"The Raton City Council last night passed the famous 'Green River' Ordinance as a further constructive aid for local businessmen." Exhibit 2394 (No. 8, p. 1) and *TNEC Hearings* 15970.

The A.P. Report noted:

"The Ordinance, council members said, is designed to protect local merchants from house-to-house salesmen and peddlers." *Ibid.*

In Mexico, Mo., the *Intelligencer* (June 17, 1937) reported:

"City attorney George P. Adams, who prepared the ordinance at the request of the council, said it was 'the solution to the problem of an undesirable and increasing influx of peddlers' and was 'designed to protect the home merchants'." Exhibit 2394 (No. 8, p. 2).

The Florists Exchange and Horticultural Trade World (June 6, 1936) states:

"Businessmen in many municipalities have for years employed legal talent to discover a way of limiting the house-to-house competition of direct sellers"

and suggests that the Green River ordinance

"may prove useful as a model". Exhibit 2394 (No. 8, pp. 11-12).

sible sponsorship by members of the community not financially interested in local retail establishments be obtained.[6]

The local merchants' jealousy of the interstate competitor is all to familiar to this Court. It long ago perceived that such ordinances are

> "imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign

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[6] *North Western Druggist* (March 1, 1938) Records of the TNEC Exhibit 2394, *supra*, (No. 8, pp. 12-13) and *TNEC Hearings* 15971. The TNEC was informed that Community Builders, Inc., a publisher of retail trade association journals, fostered merchant action to obtain enactment of Green River ordinances and sold road signs to be placed along highways reading in substance "Green River ordinance in force here. Peddlers and solicitors pass on." *TNEC Hearings* 15971.

North Western Druggist (April 1, 1938) Exhibit 2394 (No. 8, p. 9) suggests writing to the president of Community Builders, Inc., to obtain complete information on the promotion of the Green River ordinance.

Chamber of Commerce officials circularized communities offering "a service on how to get the Green River ordinance." *TNEC Hearings* 15972.

The *Grocers Commercial Bulletin* (February 17, 1938) states that "The Green River Ordinance idea" was

> "introduced in this territory by Grocers Commercial Bulletin three years ago, and more recently championed by Community Builders and trade associations." Exhibit 2394 (No. 8, p. 10).

Hardware Trade and Sporting Goods (November 9, 1937) stated that

> "Retailers' associations in midwest states are increasing their efforts to obtain enactment of Green River anti-peddler ordinances * * *. The Iowa Retail Hardware Association recently announced that it was now ready to help its members with the form of ordinance required and the necessary legal information to go with it after a thorough investigation of the subject by the Association's attorneys." Exhibit 2394 (No. 8, p. 11).

Limitations of time have not permitted research into the specific sponsorship of the Alexandria, Louisiana, ordinance. But in a recent article the City Attorney for Alexandria listed second among the considerations prompting enactment of such measures the complaint of local merchants against transient vendors who peddle goods on the street or solicit orders for subsequent shipment into the community. Peterman, *Municipal Control of Peddlers, Solicitors and Distributors*, 22 Tulane L. R. 284 (1947). Alexandria had previously adopted a licensing ordinance directed against canvassers which was invalidated in *Pictorial Review Co.* v. *City of Alexandria*, 46 F. (2d) 337. Cf. Jensen, *Burdening Interstate Direct Selling under Claims of State Police Power*, 12 Rocky Mt. L. R. 257, 261 (1940).

competition." *Robbins* v. *Taxing District*, 120 U.S. 489, 498; see also *Nippert* v. *Richmond*, 327 U.S. 416, 434.

What is perhaps new is the organized, nation-wide drive that has resulted in the astonishing spread of such Green River ordinances—almost 600 communities had such ordinances by 1940.[7] It is time to re-evaluate such ordinances, not alone in the conceptual terms of the "drummer" case law but in light of the devastating impact of such ordinances upon thoroughly respectable, even essential, industries such as subscription book distributors, to speak in terms of Amici Curiae's own interest.

Standard home reference books, it is well known, are sold principally by solicitation.[8] Solicitation dominates the field of encyclopedias, technical works and the like

> "because the cost of preparing such publications is so great that no commercial publisher would make the venture without reasonable assurance of sufficiently large sales to yield a profit."[9]

Solicitation alone can give the assurance.[10] Even university-financed publications such as the Oxford *New English Dictionary* and the like which

> "are indispensable tools for scholars and libraries * * * have to be sold mainly by subscription."[11]

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[7] *TNEC Hearings* 15968, 15969, 15985.

[8] Subscription, i.e. solicited book sales,

> "equal or exceed in dollar value the sales of trade books sold over the counter." Compton, *Subscription Books* 6 (R. R. Bowker Memorial Lectures, N. Y. Public Library, 1939).

[9] *Id.* at 8; App. pp. 28-29.

[10] This is an old story in the industry. In 1876, a new edition of Appleton's New American Cyclopaedia cost more than $500,000 to produce, not including the cost of manufacture. Publication could not have been

> "undertaken without a loss to the publishers if they depended on their sale in the book-stores. It was absolutely necessary to make the sales strictly by subscription through canvassing agents * * *." Derby *Fifty Years Among Authors, Books & Publishers*, 182-183 (N. Y. 1884). See also Compton, at 10-12; App. p. 29.

[11] Compton, at 9.

To view the problem whole, it must be borne in mind that

> "no inconsiderable part of the output of the university presses is sold by subscription methods. So too with medical books, law books, religious books, and technical books in many fields. Publishers of such works cannot depend entirely on sales through bookstores; they have to canvass their own special segments of the public both by mail and by salesmen."[12]

The 95% of the books sold by Amici to individuals is almost entirely sold through solicitation. App. p. 27. Where Green River ordinances are enforced, subscription book sales are reduced to a slight trickle. App. pp. 27-28. In practice the requirement of an invitation before coming upon the premises has operated as a prohibition of solicitation.[13] App. p. 29. Practically no subscription books are sold through retail book sellers, department stores or mail order houses. App. p. 27. Furthermore, bookstores are not universally available.[14] To confine Amici to sales in response to advertising or by bookstores would not only cripple sales volume and result in prohibitive prices, but it well might discourage publication altogether.

In short, if the Green River ordinance continues to find increasing acceptance, it may unexpectedly strike a death blow at the system of selling reference books which can only be sold by solicitation. No good reason has been ad-

[12] *Id.* at 12.

[13] *TNEC Hearings* 15973-74: "It is a practical prohibition." See supra, p. 10.

[14] In 1939, there were about 6,000 retail bookstores in the United States; only about a thousand stocked such basic reference works or had a staff competent to sell them; more than 30,000,000 people were without direct access to a bookstore; and nearly half of our cities in the 5,000 to 100,000 class had "no book outlets worthy of the name." Compton, at 10. *American Booktrade Directory* (R. R. Bowker Co., New York, 11th ed. 1949) lists 9,600 retail book outlets. This includes many that are merely drug stores, toy and gift shops and specialized bookstores. The entire state of Louisiana has only 91 book outlets of which only 17 are in the two "active" classifications of the Directory.

vanced for inflicting so heavy a blow on a thoroughly respectable and useful business.

The problem is not solely one of pure commercial interest to Amici. We trust that we may be absolved of Babbittry when we affirm that to institutions such as the University of Chicago, which publishes and distributes the Encyclopaedia Britannica, one of Amici, there is a pride in making available to the great populace a reference work which will advance the progress of learning.[15] And Amici submit that there is a genuine public interest in insuring that such works are made available to the public at the lowest possible cost. Despite subsidies, such University publications "have to be sold mainly or largely by subscription."[16]

Education has become a critical federal problem, as is illustrated by the high army rejection rate for illiteracy. Home reference works are a highly important adjunct of education. They remove burdens from inadequate public and school libraries. They promote in the home that lively interest in letters that contributes to the growth of an enlightened citizenry. Unreasonable regulation of such activities, therefore, goes far deeper than the private interests of Amici—it may seriously injure the educational aid offered to children of the community by standard reference works.

2) *The Ordinance Amounts to a Flat Prohibition:*

It has at times been suggested that the loophole for solicitation by invitation removes the ordinance from the realm of flat prohibition.[17] The suggestion is so impra-

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[15] "The monumental *Dictionary of National Biography* was financed by George Smith of the now vanished firm of Smith, Elder & Co. He undertook this work as a contribution to learning, knowing well it would cost him a fortune which he could never hope to recover." Compton, at 8.

[16] Compton, at 9.

[17] "* * * there is no prohibition of interstate commerce; all the solicitor has to do is to get on a telephone and get an invitation to call at the home." *Breard* v. *City of Alexandria*, 69 F. Supp. 722, 723-724; *City of Alexandria* v. *Jones*, 216 La. 923, 45 So. (2d) 79 (1950).

ticable and financially burdensome as to spell absolute prohibition. The proponents of such legislation have unabashedly said as much.[18]

Solicitation is organized for distribution at minimum expense. Experience has shown that it is most productive when conducted from door-to-door on a systematic street by street basis. If a resident is not interested, the loss has been merely a small expenditure of time.

But consider the obstacles raised by the ordinance. A resident may not be at home when called. Such calls run up costs and eat up time. A second or third telephone call may be unfeasible because it may prove undesirable to visit a solitary resident in a given area. Assuming that invitations are forthcoming, it may be necessary to hop across town rather than use the time-saving door-to-door canvass. The entire process is costly and time-consuming, adding at every step to the price paid by the ultimate consumer and reducing the volume of sales. And the mails are no more effective. It is well known that the bulk of commercial mail is given scant consideration by the average resident, and

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[18] *Dry Goods Journal*, March 1, 1938, quoted in *TNEC Hearings, supra*, at 15971: "Green River, Wyoming, through an ordinance that has been upheld by the courts *has put a stop* to house-to-house canvassing." Cf. *North Western Druggist*, December, 1934: "In many cities, towns and villages, it [solicitation] is being stopped—has been stopped—and here's how!", referring to the Green River ordinance. Records of the TNEC, Exhibit 2394 (No. 8, p. 12).

See Farha, *Trade Barriers in the Local Sphere*, 9 Geo. Wash. L. R. 853, 864 (1941): "The most famous method of excluding non-resident dealers is the 'Green River Ordinance'. * * * This ordinance effectively hinders peddlers and solicitors to such an extent that those in such business have been forced in many instances to discontinue operations." Sikes and Parrish, *Municipal Trade Barriers*, 16 Ind. L. J. 220, 232, (1940): "That ordinances of this type are a most effective trade restriction is too obvious to require elaboration." Jensen, *Burdening Interstate Direct Selling under Claims of State Police Power*, 12 Rocky Mt. L. R. 257, 263 (1940): The Green River ordinance, except in the four states where it had then been held invalid, "is now seriously crippling interstate direct selling." *TNEC Hearings* 15973-74: "It is a practical prohibition." McIntire and Rhyne, *Municipal Legislative Barriers to a Free Market*, 8 Law and Contemporary Problems 359, 361 (1941): "perhaps the most drastic local regulation directed at a particular method of doing business."

householders generally do not take time to respond to circulars by mail.[19]

Rarely does a father before inspection visualize the contribution a children's reference work may make to his child's education. One who does not visualize the need is unlikely to invite the absent solicitor. Expanding school requirements of growing children may raise the question whether home reference works are necessary, but it requires examination of the books to drive the need home. The solicitor's welcome is often one that ripens after he knocks.[20] To make solicitation turn on telephone or mail invitation is in practical effect to prohibit it. Experience has proven this to be the fact. App. p. 19. Thus the Alexandria ordinance is in effect an unqualified prohibition.

To Amici Curiae this threatens the extinction of their business.

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[19] In a landmark case, this Court said in answer to the argument that solicitors could procure business by mail or by other means, that

> "in numberless instances, the most feasible, if not the only practicable, way for the merchant or manufacturer to obtain orders in other states is to obtain them by personal application, either by himself, or by some one employed by him for that purpose; and in many branches of business he must necessarily exhibit samples for the purpose of determining the kind and quality of the goods he proposes to sell, or which the other party desires to purchase." *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 495-496.

And it declared with respect to a suggested alternative sales mechanism:

> "Surely, he cannot be compelled to take this inconvenient and expensive course." 120 U. S. at 495.

[20] This was the problem encountered in launching the sewing machine, a novel form of vacuum cleaner or a children's encyclopedia. Compton, *Subscription Books* 10-12 (R. R. Bowker Memorial Lectures, N. Y. Public Library, 1939); Melder, *State and Local Barriers to Interstate Commerce in the United States—A Study in Economic Sectionalism* 59 (The Maine Bulletin, University of Maine Studies, 2d Series, No. 43, November 1937); Earl Lifshey, *Door to Door Selling* Fairchild Publication, Inc. (1948).

3) The Green River Ordinance is an Unconstitutional Burden on Interstate Commerce.

The fact that the Green River ordinance has been copied wholesale,[21] coupled with the overpowering evidence that its adoption was inspired by the concerted efforts of retail trade associations, precludes the suggestion that such legislation is an adjustment to unique local problems which the Court should view with tolerance. The presumptions which might ordinarily be invoked for the legislative judgment on local matters are utterly unrealistic when viewed against the organized and wholesale adoption of an ordinance ostensibly designed for the protection of householders but in fact energetically sponsored by national merchants' organizations in the drug, hardware and drygoods trades. State courts in passing upon these ordinances have brushed aside as subterfuge the argument that they were enacted to protect housewives.[22] This Court is no less able than the state courts to look behind the subterfuge to the actual motivation. It said as much in *Best & Co.* v. *Maxwell*, 311 U.S. 454, 455-456:

> "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."

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[21] "Trade barrier laws do not grow like weeds in a vacant lot, without planting or tending. They are drafted, proposed, advocated by cajolery, pressure, and inducement, and supported against counterattack. The driving force for their enactment and administration is supplied by groups which find them serviceable." Edwards, *Trade Barriers Created by Business*, 16 Ind. L. J. 169 (1940).

[22] See e.g., *City of Orangeburg* v. *Farmer*, 181 S. C. 143, 186 S. E. 783, 785 (1936) ("The ordinance was passed by the city council of Orangeburg at the request of the Retail Merchants Association of that city, and not by reason of the complaint of householders."); *N. J. Good Humor, Inc.*, v. *Bradley Beach*, 124 N. J. L. 162, 11 A. (2d) 113, 117 (1940) ("Evidently, the motive for this municipal action was the overthrow of competition for the benefit of local merchants and storekeepers").

To conclude

> "that the ordinance is valid simply because it *professes to be* a health measure would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance where a state *artlessly discloses an avowed purpose to discriminate* against interstate goods." *Deal Milk Co.* v. *Madison*, 340 U. S. 349, 354.

In assessing the proper scope of the police power this Court may consider that most state courts, which presumably would be zealous to safeguard state prerogatives, deny that the police power extends to such interference with a lawful mode of business.[23] As was said in *N. J. Good Humor, Inc.*, v. *Bradley Beach*,[24]

> "* * * it is not within the bounds of reason to prohibit particular classes of business, lawful in themselves, for the enrichment of another class. Such subversion of competition is not in the public interest, and the police power can only be addressed to that end."

We need not dwell on the preponderating state court refusal to shield Green River ordinances behind the police power. Let it be assumed that the power to prohibit is absolute—an assumption that will scarcely stand up against the "drummer" cases—the state may yet

> "not adduce an arbitrary *general* power to exclude for *no* reason as affording any sanction for a claimed

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[23] *Wilkins* v. *City of Harrison*, 93 L. Reporter (Ark.) 41 (1951), 19 L. W. 2372 (Feb. 20, 1951); *Ex Parte L. G. Faulkner, Jr.*, 143 Tex. Crim. Rep. 272, 158 S. W. (2d) 525 (1942); *City of Osceola* v. *Blair*, 231 Iowa 770, 2 N. W. (2d) 83 (1942); *City of Mt. Sterling* v. *Donaldson Baking Co.*, 287 Ky. 781, 155 S. W. (2d) 237 (1941); *DeBerry* v. *LaGrange*, 62 Ga. App. 74, 8 S. E. (2d) 146 (1940); *N. J. Good Humor, Inc.*, v. *Bradley Beach*, 124 N. J. L. 162, 11 A. (2d) 113 (1940); *Jewel Tea Co.* v. *City of Geneva*, 137 Neb. 768, 291 N. W. 664 (1940); *White* v. *Town of Culpeper*, 172 Va. 630, 1 S. E. (2d) 269 (1939); *Prior* v. *White*, 132 Fla. 1, 180 So. 347 (1938); *Tea Company* v. *Bel Air*, 172 Md. 536, 192 Atl. 417 (1937).

[24] 124 N. J. L. 162, 11 A. (2d) 113, 117 (1940).

> power to exclude for a *particular* intrinsically *unconstitutional* reason."[25]

Unwarranted discrimination against a lawful business is intrinsically unconstitutional.

This is not a case where the state is exercising its police power over matters of purely local concern. Here, the discrimination is against interstate commerce, and the state police power collides with the constitutional prohibition against burdening interstate trade. It needs no argument that Appellant and Amici are engaged in interstate commerce:

> "The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce." *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 497; see also *Nippert* v. *Richmond*, 327 U. S. 416, 423, 427.

We have shown that the Green River ordinances effectively bar door-to-door canvassing and thereby choke off interstate sales at the source. The seller is denied free access to the buyer

> "with the result that the commerce is stopped before it is begun." *Nippert* v. *Richmond*, 327 U. S. 416, 429.

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[25] Powell, *The Supreme Court and State Police Power, 1922-1930*, 141 (1932); *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 434.

Then too

> "the state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition." *Hood & Sons* v. *Du Mond*, 336 U. S. 525, 538.

In the *Du Mond* case, loc. cit., the Court cited with approval *Buck* v. *Kuykendall*, 267 U. S. 307, where a Washington statute prohibiting use of the public highways by common carriers without a certificate of public convenience was overturned because, in the words of Mr. Justice Brandeis, the

> "primary purpose [of the statute] is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition." (at 315).

The polite disguise of the drummer's tax[26] or license requirement[27] having proven unsuccessful, resort is now had to the equivalent of a flat prohibition.[28] In a nation which grew because the economy spilled over state lines, it is too late to retreat to a walled-city economy, or, as Mr. Justice Cardozo said, to "a position of economic isolation." *Baldwin* v. *G. A. F. Seelig,* 294 U. S. 511, 527.

The Green River ordinance, we repeat, paralyzes an important segment of interstate commerce in the interest of the local merchant. Motive apart that is its plain effect. The ordinance does "in its practical operation work discrimination against interstate commerce." *Best & Co.* v. *Maxwell,* 311 U. S. 454, 456.[29] Solicitude for freedom of of commerce linked to recognition of the inability of non-residents to attain relief through the political channels accessible to citizens of the state[30] have prompted this Court to scrutinize such statutes with a critical eye. It is, repeated Mr. Justice Cardozo,

> "the established doctrine of this court that a state may not, *in any form or under any guise,* directly burden the prosecution of interstate business." *Baldwin* v. *G. A. F. Seelig,* 294 U. S. 511, 522.

The court below would save the ordinance on the ground that it

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[26] *Robbins* v. *Shelby Taxing District,* 120 U. S. 489; *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33, 55-56, and note 11; *Nippert* v. *Richmond,* 327 U. S. 416, 417-418, and note 1.

[27] *Largent* v. *Texas,* 318 U. S. 418; *Pictorial Review Co.* v. *City of Alexandria,* 46 F. (2d) 337.

[28] A flat prohibition was held invalid in the absence of proof that the abuses could not be cured by regulation in *Good Humor Corp.* v. *City of New York,* 290 N. Y. 312, 49 N. E. (2d) 153 (1943).

[29] Compare *Dean Milk Co.* v. *Madison,* 340 U. S. 349, 354: "But this regulation, like the provision invalidated in *Baldwin* v. *Seelig, Inc., supra, in practical effect* excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois."

[30] *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33, 45-47, Note 2.

> "makes no distinction between resident solicitors and non-resident solicitors." *City of Alexandria* v. *Breard*, 217 La. 820, 47 So. (2d) 553, 556 (1950).

But it does in fact discriminate between solicitors and local retail merchants[31] and between non-resident manufacturers who sell through local retail outlets and those who sell by solicitors. In the absence of overriding need to safeguard valid local interest, which has not here been shown, it is not for the State to determine which of two equally legitimate competitors shall have access to its markets. Compare *Buck* v. *Kuykendall*, 267 U. S. 307, 315-316.

Once it is established that interstate trade is burdened it becomes

> "immaterial that local commerce is subjected to a similar encumbrance." *Freeman* v. *Hewit*, 329 U. S. 249, 252; *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 354, note 4.

In other words

> "A burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute." *Minnesota* v. *Barber*, 136 U. S. 313, 326.

4) *The Attempted Justifications of the Ordinance Are Inadequate.*

We have shown that the effect of the challenged ordinance is virtually to prohibit subscription book sales in interstate commerce in Louisiana. If a burden on interstate commerce which so drastically injures legitimate business can be justified at all, we ask what justification has been shown in the instant case?

a) It is said that some householders have complained that in some instances,

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[31] " * * * here as in *Best & Co.* v. *Maxwell* * * * the 'real competitors' of petitioner are, among others, the local retail merchants." *Nippert* v. *Richmond*, 327 U. S. 416, 433, note 24.

> "solicitors were undesirable or discourteous, and some householders complained that, whether a solicitor was courteous or not, they did not desire any uninvited intrusion into the privacy of their home." R. 6

It does not appear that such complaints were numerous, serious or even genuine.[32] The exemption for intrusions by vegetable solicitors, the evidence that the ordinance is the product of an organized campaign by retail merchants, and the failure to consider amply adequate alternatives for protection of the household, such as a trespass-after-warning statute, requires that this alleged ground be viewed with skepticism.

b) The court below suggested that the ordinance was a protective measure against depredations of the lawless. R. 21. There is no showing that the city council was motivated by apprehension of such a danger. R. 6.[33] Nor is there any showing of the magnitude or real shape of the problem. What kind of crimes or frauds have been effected by what kind of solicitors?[34] Nothing in the nature of book-vending suggests that book-vendors are more likely

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[32] Compare *White* v. *Town of Culpeper*, 172 Va. 630, 1 S. E. (2d) 269, 272 (1939): "there is an utter lack of evidence of complaint upon the part of any of the householders of the town."

[33] Neither this nor the succeeding argument is referred to in Mr. Peterman's article, *Municipal Control of Peddlers, Solicitors and Distributors*, 22 Tul. L. R. 284 (1947). The city's Brief in the court below states:

> "The City of Alexandria contends * * * that the ordinance under consideration does not prohibit the circulation or distribution of magazines or other publications, but merely protects the occupants of private residences from unwarranted intrusion by uninvited solicitors who invade the privacy of the home to sell or solicit the sale of their goods." Brief on Behalf of the City of Alexandria, Appellee, p. 7.

There is no suggestion in the Brief of any other purpose for the ordinance.

[34] Soderman and O'Connell, *Modern Criminal Investigation*, Chapter 20, give an example of an attack on an armored car effectuated with the use of a peddler's push cart. If this instance is illustrative of the real nature of the problem, it hardly affords a basis for a statute which excludes responsible book salesmen but permits push cart peddlers of farm produce to continue.

to be burglars than are the exempted milkmen and vegetable solicitors.

c) It is sometimes argued that solicitors misrepresent their goods and disappear with the purchase price or deposit. But it is conceded that reputable magazine subscription agencies have effectively policed themselves and as a routine practice require their salesmen, selected after careful investigation and subjected to careful training, to identify themselves to local police authorities and such organizations as the Better Business Bureau and the Chamber of Commerce. Their solicitors are listed in a Central Registry list furnished to local police and community groups. R. 7-9. Responsible sellers of subscription books have also effectively policed themselves.[35] Book solicitors, if anything, are less likely to engage in fraud than the unscreened yet exempted egg seller.

It is not sufficient to bottom such ordinances on the remote possibilities of fraud or crime. In *Real Silk Mills* v. *Portland*, 268 U. S. 325, 336, this Court refused to

> "accept the theory that an expressed purpose to prevent *possible* frauds is enough to justify legislation which really interferes with the free flow of legitimate interstate commerce."

Such interference is the less warranted if reasonable nondiscriminatory alternatives exist. Only the other day the Court declared with respect to an ordinance requiring milk pasteurization within five miles of the city:

> "Madison plainly discriminates against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, *if reasonable nondiscriminatory alternatives*, adequate to conserve legitimate local interests, are available." *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 354.

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[35] App. pp. 28-29. Compton, *Subscription Books* 44-46 (R. R. Bowker Memorial Lectures, N. Y. Public Library, 1939).

This Court has pointed out practical alternatives that are as applicable here as in the context where they were suggested. A registration and identification statute administered in good faith would be a valid police measure, *City of Manchester* v. *Leiby*, 117 F. (2d) 666; cf. *Murdock* v. *Pennsylvania*, 319 U. S. 105, 113, 116. Regulation of the time and manner of solicitation, *Martin* v. *Struthers*, 319 U. S. 141, 143, 148; *Cantwell* v. *Connecticut*, 310 U. S. 296, 304, 306-307, and subsequent sanctions rather than the previous restraint of hypothetical frauds and abuses would be permissible and effective. If frauds exist, they may be denounced as offenses and punished by law. *Schneider* v. *State*, 308 U. S. 147, 164. Should householders genuinely wish to bar solicitation, a trespass-after-warning statute will protect them. *Martin* v. *Struthers*, 319 U. S. 141, 147-148.

There is no evidence that Alexandria has explored reasonable alternatives and found them wanting. In view of the threatened extinction of a legitimate business, we are entitled to ask that the local power be exercised with care and with a clear showing of a genuine need which may be scrutinized by this Court, that the local ordinance be narrowly drafted to meet the real need, and that alternative means to achieve such local ends as are legitimately advanced be fully considered. All of that is lacking here.

II

The Ordinance Prohibits the Dissemination of Information and Ideas and Therefore Violates the Freedom of the Press Guaranteed by the First and Fourteenth Amendments.

Appellee would have it that freedom of the press is only for the citizen who is

> "distributing pamphlets or literature setting forth his views on matters of public interest or dealing with religion or politics."

In response to a question by the court below, Appellee stated,

> "Since the newspaper is a commercial activity we are of the opinion that the ordinance would apply in the same manner that it applies to all other commercial activities." Supp. Brief in Behalf of Appellee, p. 3.

A total prohibition of circulation, for that, as has been shown, is the effect of the ordinance on Amici, can not stand up in light of *Grosjean* v. *American Press Co.*, 297 U. S. 233, 245. There, an attempt to tax commercial newspapers was struck down because taxation, if valid, "might well result in destroying both advertising and circulation." For, as was reaffirmed in *Lovell* v. *Griffin*, 303 U. S. 444, 452:

> " 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' Ex parte Jackson, 96 U. S. 727, 733."

Liberty to circulate perforce includes freedom to solicit for circulation.[36]

Appellee would carve an exemption from the guarantee of the Fourteenth Amendment in reliance on recent dicta distinguishing between colporteurs and "commercial" solicitation. Such dicta make it desirable at the outset to summarize some basic principles of free press.

Commercial newspapers, magazines and treatises, because of the light they shed on the public and business affairs of the Nation, *must* be immune from a deliberate and calculated device whose direct tendency is

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[36] "Liberty of the press embraces the circulation and distribution of magazines and periodicals as well as religious literature. The solicitation of a subscription to a magazine or periodical expressing opinions and disseminating views is merely a step and but one of the steps in its publication and circulation. The mere fact that a charge is made for such literature does not remove the solicitation from the category of those activities which are included in the steps which lead to the full enjoyment of the rights guaranteed to a free press." *Robert* v. *City of Norfolk*, 188 Va. 413, 49 S. E. (2d) 697, 703 (1948).

> "to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees." *Grosjean* v. *American Press Co.*, 297 U. S. at 250.[37]

The commercial press, even the merely entertaining or the trivial, is protected against undue burdens on its distribution. *Winters* v. *New York*, 333 U. S. 507, 510. For

> "Great secular causes, with small ones, are guarded. * * * And the rights of free speech and a free press are *not confined to any field of human interest.*" *Thomas* v. *Collins*, 323 U. S. 516, 531.

In short,

> "The press in its historical connotation *comprehends every* sort of publication which affords a *vehicle of information* and opinion." *Lovell* v. *Griffin*, 303 U. S. 444, 452.

Even though "business or economic activity" be involved, the First Amendment liberties are clothed with "a sanctity and a sanction not permitting dubious intrusions." *Thomas* v. *Collins*, 323 U. S. 516, 530, 531. Paine's historic pamphlets, the Court has often noted, were not distributed without charge. The press, to be free, must be so "not merely to those who can pay their own way." *Murdock* v. *Pennsylvania*, 319 U. S. 105, 111. A publication does not lose its claim to the shelter of the free press provision because it is sold at a profit. To adopt that view would be to deny to virtually every book, periodical or newspaper the benefit of such protection.

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[37] The Court also stated that

> "The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern." 297 U. S. at 250.

These principles leave no room for a prohibition which, for the flimsiest of reasons, prevents the circulation of publications. The invalid tax on advertising in the *Grosjean* Case is not nearly so destructive as the Green River prohibition against solicitation by publishers of basic reference compendiums in the only manner that is commercially feasible. Because the ordinance operates in fact to restrict a First-Amendment right, it is subject to searching judicial scrutiny. Whatever presumptions the ordinance might otherwise enjoy have been plainly overcome by a demonstration of its real motivation, of its drastic effect, of the thinness of the reasons advanced for it, and of the failure of the city council to consider reasonable alternatives or to draw the ordinance with the narrowness and care demanded by its destructive impact on the distribution of lawful publications. The ordinance was intended as a barrier to free circulation of subscription books. It therefore runs afoul of "the principles of unrestricted distribution of publications" (*Winters* v. *New York*, 333 U. S. 507, 510) and is unconstitutional.

Valentine v. *Chrestensen*, 316 U. S. 52, is not to the contrary. That case involved distribution of a purely commercial handbill advertising the exhibition of a submarine, to which had been appended a protest against police action "for the purpose of evading" an ordinance prohibiting distribution of advertising matter in the public streets. The right of free speech guaranteed by the constitution is essentially the right to disseminate *ideas and opinion*. An invitation to view a submarine or to purchase potatoes is not transmuted into an "idea" because printed on a handbill. It was not for this that men fought on behalf of freedom of the press. Not that an "idea" must be religious, political, social or profound. It may even be "entertaining". *Winters* v. *New York*, 333 U. S. 507, 510. But it must be more than a crass, self-serving invitation to buy. A merchant advertising his wares advances primarily his own interest, but the newspaper and encyclopedia pub-

lisher disseminates information essential to the democratic process. To suppress advertising is to hurt only the private commercial interest; to curb dissemination of ideas is to inflict injury on the public. Moreover, suppression of purely commercial handbills need not spell extinction to the businessman who may advertise his product through other media. The vice of the Green River ordinance, as applied to Amici, is that it effectively prohibits circulation and brings the dissemination of ideas to a standstill.

In sum, *Valentine* v. *Chrestensen* cannot be read to overrule *sub silentio* the rule of *Grosjean* v. *American Press Co.* The latter held that the fact that "ideas" are disseminated on a "commercial" basis did not deprive newspaper circulation of free press protection. The former held that a pure "commercial" activity, divorced from the dissemination of ideas, cannot invoke free press protection because printed on a piece of paper.

It is true that in *Murdock* v. *Pennsylvania*, 319 U. S. 105, 111, it is stated that

> "The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books." [38] *See also Martin* v. *Struthers*, 319 U.S. 141, 142, note 1.

This case does not require a decision of what was only suggested in those cases, i.e., that the regulation or taxation of evangelists may be differentiated from that of booksellers. We are not here complaining of discrimination in favor of colporteurs. Nor are we here confronted with

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[38] In *Follett* v. *McCormick*, 321 U. S. 573, 575, the Court, explaining the *Murdock* case, stated:

> "since they were engaged in a 'religious' rather than a 'commercial' venture, we held that the constitutionality of the ordinances might not be measured by the standards governing the *sales of wares* and merchandise by *hucksters* and other merchants."

But the sale of potatoes is not a dissemination of ideas; the circulation of books or periodicals is.

proper regulation or taxation of booksellers. For in practical effect the Green River ordinance *prohibits* the circulation of subscription books. The issue here is whether a community may *prohibit* the circulation of secular ideas because the distribution is at a profit.

Clearly the freedom to circulate ideas can not be confined to religious doctrine. The Court has emphasized that

> "Freedom to distribute *information* to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, *it must be fully preserved.*" *Martin* v. *Struthers*, 319 U.S. 141, 146-147.

Although this was said in the context of a Jehovah's Witness case, it is too late to insist that freedom of expression is confined to advocates of religous belief.[39] Much blood was spilled for the right freely to disseminate secular information. Why, indeed, should the distribution of the Harvard Classics be entitled to less protection than dissemination of "The Watchtower"? The First Amendment creates no hierarchy of rights. A compilation of social, political, scientific or other ideas embodied in a magazine or anthology is as much within the orbit of the First Amendment as the dissemination of novel religious ideas. In extending protection to a religious minority, the Court surely did not intend to tear down long-standing safeguards for the circulation of non-religious ideas.

The protection for the publication of secular ideas has its roots in the long fight against "*taxes on knowledge*". This Court struck down a tax on a frankly "commercial" newspaper publishing activity in *Grosjean* v. *American Press Co.*, 297 U.S. 233, because it volated the free press

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[39] In a Jehovah's Witness case involving a licensing-censorship provision, the Court pointed out that in a companion case in which reliance was placed "upon the free exercise of religion", the "appeal was dismissed for want of a substantial federal question." *Lovell* v. *Griffin*, 303 U. S. 444, 449.

guarantee.[40] To hobble the free circulation of secular ideas because a profit system demands commercial circulation is to

> "impair those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government." *Thornhill* v. *Alabama*, 310 U.S. 88, 95.

So long as booksellers are agents for the dissemination of knowledge, so long as we have a profit system in which the circulation of ideas must pay its way, booksellers cannot be read out of the protection of free press without doing violence to long cherished constitutional rights.

It cannot be unduly emphasized that

> "it is useless to be free to publish if the printed material cannot get out to readers." 1 Chafee, *Government and Mass Communications*, 65 (1947).

Finally,

> "It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and *'appraise the substantiality of the reasons advanced'* in support of the challenged regulations." *Thornhill* v. *Alabama*, 310 U.S. 88, 96.

The basic works of information published by Amici afford a vital basis for social inquiry and continuing reappraisal. Free circulation of such information is at the very core of the freedom of the press. The present ordinance is in practical effective prohibitive of the traditional—the only—effective method of sale of encyclopedias and other major works of reference. It is not merely regulatory: it is de-

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[40] It may be suggested that the Grosjean tax was discriminatory. But the Court rested its decision squarely on "free press", reserving equal protection considerations, 297 U. S. at 251; and discrimination is not the test of an invasion of free speech:

> "The fact that the ordinance is 'nondiscriminatory' is immaterial. The protection afforded by the First Amendment is not so restricted." *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115.

structive. Were it a bona fide exercise of the police power, an assumption precluded by its face and by the history of its sponsorship by selfish competitive groups, it would yet shatter upon the guarantee of a free press. For without freedom to circulate there can be no free press.

CONCLUSION

The Green River Ordinance here involved was intended to be and acts as a device to create community isolation for the benefit of a special class—local merchants and the merchandising systems that depend on them. The Ordinance is bad in all its applications, because in practical effect it discriminates against and burdens interstate commerce without reasonable justification. It is bad as applied to the distribution of books or magazines because in practical effect it prohibits the circulation of such media of communication, thereby violating the constitutional guaranty of a free press.

Respectfully submitted,

CLARK M. CLIFFORD,
Attorney for Amici Curiae.

CLIFFORD & MILLER,
Washington, D. C.,
Of Counsel.

APPENDIX

Affidavit on Behalf of Amici Curiae

Frank B. Taussig, a resident of New York, New York, being duly sworn, deposes and affirms that:

1) Affiant is the attorney in fact for Amici Curiae, namely, for The Book House for Children, P. F. Collier & Son Corp., F. E. Compton and Company, Encyclopaedia Britannica, Field Enterprises, Inc., the Grolier Society, Inc., and United Educators, Inc.

2) Affiant has engaged in the subscription book business for twenty-five years, is presently Executive Vice-President of the Grolier Society, Inc., and is thoroughly conversant with the history and day-to-day operations of the industry.

3) Amici Curiae publish and/or sell anthologies, atlases, bibles, dictionaries, encyclopedias and sets of standard authors. Amici do 75 to 80% of all of the subscription book business in the United States. In 1950 the industry did a total dollar volume business of $75,000,000. Except for about 5% of the product which is sold to institutions, schools and libraries, the books produced by Amici are sold almost entirely to individuals by solicitation at their homes. A negligible amount of the books are sold through retail outlets, mail orders and other forms of merchandising. Affiant states of his own personal knowledge that practically no subscription books are sold through book stores, department stores or mail order houses. The vast bulk of such books are sold on a house-to-house or institution-to-institution basis by salesmen of the company or by salesmen of exclusive distributors.

4) Affiant states of his own knowledge that in those cities in which a Green River ordinance is in effect and is enforced against subscription book salesmen, a very small number of subscription books are sold to individuals. The requirements of obtaining an invitation by letter or telephone to

visit the home constitute an effective barrier to sales to individuals.

5) Solicitation is usually done on a house-to-house canvass basis. Generally the solicitor carries with him a sales kit which serves to identify him and which includes a sample of the binding used on the books, a prospectus describing the books and the method of purchase and sheets from the books with colored illustrations, if any. In taking the order the solicitor, in most cases, receives a down payment and the customer is billed for the balance of the account on monthly installments. When orders are received from the solicitor by the publisher the books are shipped by the publisher directly to the purchaser.

6) a. The subscripton book industry has entered into a cooperative arrangement with the National Better Business Bureau whereby its salesmen may register with Better Business Bureaus and Chambers of Commerce who are subscribing to this plan. A registration form is supplied to the salesmen and also a list of those Bureaus and Chambers of Commerce particpating. Salesmen then register with them in person or by mail, whichever is required. In towns where registration with municipal authorities is required, salesmen usually comply with those regulations for their own protection.

b. An applicant for a position with Amici is required to fill out an application form and to give references. These references are then checked and if any question is raised as to the character of the individual he is not hired. The character and education of subscription book salesmen is generally of high quality. The training program consists of lectures in the office and study of the products; and the new salesmen is also assigned to an experienced salesman who gives him actual training in the field.

7) a. The products sold by Amici require a very large capital investment. Before a major encyclopedia can be published, the publisher must invest in excess of $1,000,000.

He cannot wait for people to come to him but must insure a market for his product. He must take his books to the public in the most direct way. Experience has shown that the most efficient way of marketing such books is house-to-house solicitation.

b. Affiant states of his own knowledge that the reference book industry has found that house-to-house solicitation has resulted in a wide-spread distribution and kept costs of standard reference works down. He states of his own personal knowledge that it is easier to sell a functional product or service which requires no buyer participation, such as a ticket to a motion picture or a television set, than to sell a product such as books, enjoyment of which requires the active participation of the purchaser. Affiant states from personal experience that buyer inertia towards standard reference books can only be overcome by direct face-to-face contact. Telephone calls requesting permission to visit a person for the purpose of selling him books are in the great mass of cases non-productive of invitations.

8) In his entire experience, Affiant has not heard of charges of violence, rape or theft brought against any reference book salesmen. In some instances salesmen have cashed checks made out to the selling company and absconded with the down-payment. In such cases the company has, however, made the loss good to the purchaser.

s/ FRANK B. TAUSSIG.

Subscribed and sworn to before me, a Notary Public of the State of New York, City of New York, this 23rd day of February, 1951.

s/ DOROTHY A. DUNN,
Notary Public.

My Commission expires: March 30, 1952.